

This newsletter provides information on issues of current interest and an update on recent developments in international arbitration law and practice. It is written in general terms. The application of the law always depends on the particular facts of the case. If you would like to follow up any of the issues raised, please contact one of the individuals listed below:

Amsterdam	Klaas Bisschop
Beijing	Robert Lewis
Brussels	Jacques Derenne
Budapest	Laszlo Partos
Chicago	Brad Ockene
Düsseldorf	Alexander Loos
Frankfurt	Robert Hunter
Hamburg	Reiner Schmidt
Hong Kong	Mark Lin
London	Michael Davison
Madrid	José Luis Huerta
Milan	Francesca Rolla
Moscow	Dominic Pellew
Munich	Karl Poernbacher
New York	Edward Schorr
Paris	Jean-Georges Betto
Prague	Miroslav Dubovsky
Rome	Gian Paolo Zanchini
Shanghai	Terence Wong
Singapore	Richard Tan
Tokyo	Lloyd Parker
Warsaw	Jolanta Nowakowska-Zimoch
Zagreb	Tin Dolicki

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## In this issue

### ARBITRATION NEWS

The latest developments in international arbitration, including commentary on recent investment treaty arbitration awards and developments in national law.



Michael Davison takes over as Global Head of Lovells' International Arbitration practice

### US SUPREME COURT: PARTIES MAY NOT AGREE WIDER GROUNDS FOR CHALLENGE

There has been a growing trend for parties to commercial arbitration in the United States to agree to broader judicial review than is permitted by the Federal Arbitration Act. That practice came under scrutiny by the US Supreme Court recently. **Eric Chang** summarises the Supreme Court's decision and considers its implications.

### THE COST OF INTERNATIONAL ARBITRATION

The cost of bringing or defending an international arbitration will be an essential part of the decision-making process when it comes to deciding strategy, both at the outset of and during proceedings. **Simon Nesbitt** and **Saira Singh** provide an overview of the costs that will be incurred and whether they can ultimately be recovered.

### NEW YORK CONVENTION: 50 YEARS AND COUNTING

The New York Convention celebrated its 50th birthday on 10 June 2008. The occasion has been marked by events and tributes organised by many of the major international arbitral institutions. **Russell Johnston** takes a brief look back over the last 50 years and identifies a call for amendment of the Convention going forward.

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## NEWS FROM LOVELLS' INTERNATIONAL ARBITRATION PRACTICE

### New Head of International Arbitration appointed

Lovells has appointed Michael Davison as its Global Head of International Arbitration. Michael is based in London and has specialised in international arbitration for many years. He has conducted many ICSID, ICC, UNCITRAL and LCIA arbitrations on behalf of significant international clients. Michael acts for clients from a wide range of jurisdictions and industry sectors including energy, commodities trading, engineering and finance. He has broad experience in all aspects of the arbitration process including ancillary proceedings before national courts on interim measures and enforcement.

The move follows the recruitment in Paris of partner Jean-Georges Betto from Derains & Associés. Jean-Georges has acted in arbitrations in construction, engineering, oil and gas and defence contracts. He is the former secretary of the working group on the reform of French international arbitration.

The expansion of Lovells' international arbitration practice continued with the recruitment in Singapore of Richard Tan as a senior consultant, from Lee and Lee. Richard is a past president of the Singapore Institute of Arbitration and was formerly on the board of directors of the Singapore International Arbitration Centre. He was joined by two former Lee and Lee colleagues, Chung Nian (Of Counsel) and associate Cheryl Fu.

## INTERNATIONAL TREATIES AND INSTITUTIONS

### ICSID Convention

Canada, which signed the ICSID Convention on 16 December 2006, has now passed legislation to implement the Convention. The Act will enable Canada to ratify the ICSID Convention and it has invited those provinces that have not done so already also to enact implementing legislation. To date, only four provinces (British Columbia, Ontario, Saskatchewan and Newfoundland and Labrador) have adopted legislation implementing the ICSID Convention. Once the Convention has been ratified, Canadian investors and foreign investors in Canada will be able to use the dispute resolution mechanisms afforded by the International Centre for Settlement of Investment Disputes (ICSID).

### New York Convention

The Convention on the Recognition and Enforcement of International Arbitral Awards, commonly known as the New York Convention, celebrated its 50th anniversary on 10 June 2008. The New York Convention creates an extensive worldwide network for the reciprocal enforcement of international arbitration awards and surpasses by some way any facilities available for reciprocal enforcement of court judgments. Various conferences and events have been held around the world to mark the occasion, including an IBA Conference, in association with the United Nations, which took place in February 2008. For more on the 50th anniversary of the New York Convention, see the article on page 15 of this newsletter.

## ICC

### New offices in Asia

The ICC announced on 12 March 2008 that the International Court of Arbitration of the ICC and the Secretariat of the ICC Court have decided to locate their new offices in Hong Kong and Singapore. The ICC has decided, by the end of 2008:

- to open in Hong Kong a branch of the Secretariat of the Court with a case management team to administer cases in the region under the ICC Rules of Arbitration
- to locate in Singapore the Director, ICC Arbitration and Amicable Dispute Resolution Asia and to open a liaison office dedicated to ICC Dispute Resolution Services there.

The ICC's decision to establish a branch of the Secretariat in Hong Kong reflects the strength of the arbitral community in both cities and will facilitate communications between the Secretariat and users of ICC arbitration based in the Far East, who will now have an ICC office in the same time zone.

### ICC Rules of Arbitration 10 years old

The ICC Rules of Arbitration (1998 edition) were 10 years old on 23 April 2008. The ICC held a conference on the impact of the rules and the development of ICC arbitration over the last ten years. Feedback was also sought on the rules, with a view to amending them if necessary.

## LCIA

### LCIA announces joint venture with Dubai International Financial Centre

In February 2008, the LCIA and the Dubai International Financial Centre (DIFC) announced a joint venture to offer commercial dispute resolution services. The DIFC-LCIA Arbitration Centre will be located in the DIFC and will administer arbitration and mediation pursuant to the DIFC-LCIA Arbitration and Mediation Rules (closely adapted from the LCIA Rules, with minor changes to suit the needs of the DIFC).

*(For news of other developments in Dubai, see the section on Dubai in "Developments in national law")*

## INVESTMENT TREATY ARBITRATION

### Venezuela "planning to denounce" treaty with the Netherlands

Investors wishing to refer investment disputes with the host State/State agency to arbitration will normally rely on an arbitration clause in the investment contract between the host State/State agency or consent to arbitration contained in a bilateral investment treaty (BIT) between the host State and the investor's home State. Forward-thinking investors may consider this when structuring their investment vehicle, for example by checking the list of countries with which the host State has BITs in force and then incorporating the investment vehicle in one of those countries. This may lead to a disproportionately large number of claims against a particular State being brought under one specific BIT, in order

to take advantage of the protections on offer. Take Venezuela for example: many of the arbitrations against it have been brought under the BIT it signed with the Netherlands (for example, *Fedax NV*; *ENI*; *ConocoPhillips*; *ExxonMobil*).

Reports now suggest that Venezuela is planning to denounce, or at least renegotiate, the BIT with the Netherlands. However, the BIT contains a "survival clause" which means that in relation to investments made before the date of termination, the protections contained in the BIT would continue to be effective for a further 15 years. The stage would then be set for wrangles as to when the investment in question was made.

If there is no contract with the host State and no BIT between the home and host States, an alternative may be to rely on the host State's own investment law to bring a claim. That is the route apparently taken by a US investor in Venezuela's telecommunications sector. As there is no BIT between the US and Venezuela, Brandes Investment is reported to be relying on Venezuela's investment law and has had its request for arbitration registered by ICSID.

### Claims under investment treaty and investment contracts to proceed in single arbitration

An ICSID tribunal has taken the pragmatic approach of allowing claims raised under an investment treaty and two separate investment contracts to proceed in a single arbitration. In *Noble Energy and MachalaPower v Republic of Ecuador*, the claimants made claims under three different instruments: the BIT between the US and Ecuador (Noble Energy being a US company); an

investment contract between the Ecuadorian government and MachalaPower's then parent company, Samedan Oil (subsequently succeeded by Noble Energy); and a concession contract between MachalaPower and CONELEC, an Ecuadorian state agency. All three instruments contained clauses referring disputes to ICSID arbitration.

MachalaPower (now an indirect subsidiary of Noble Energy) operated a power plant in Ecuador. The claimants complain about actions taken by Ecuador during the privatisation of the electricity industry, which they allege altered the framework upon which they had relied in making their investments in Ecuador. In addition, they claim that MachalaPower's business was adversely affected by agreements between Ecuador and Colombia which enabled Colombian generators to export energy to Ecuador with preferential treatment.

Although consolidation of separate arbitral proceedings is relatively common, this appears to be the first time that a tribunal has had to consider whether claims under different instruments should be heard together. Both the ICSID Convention and the ICSID Arbitration Rules are silent on the procedure to follow in such cases. It was therefore up to the tribunal to decide how to proceed. In the absence of any other guidance, the tribunal referred to the law and practice of consolidation of separate proceedings. In deciding to allow the claims to proceed in one arbitration, the tribunal noted that the disputes all arose out of the same facts, the same overall transaction and the same measures. A single arbitration would be a fair and efficient way of disposing of the disputes, whilst removing the risk of inconsistent decisions. The tribunal also

found that there was implied consent to have the disputes arising from the same overall economic transaction resolved in the same arbitration. It based its conclusion on consent on the following factors: there was a close connection between the investment contract and the concession contract - there were cross-references between them and they were signed on the same day; the dispute settlement clauses in all three instruments were coordinated, in that they all referred to ICSID arbitration; Ecuador was a party to the BIT and the investment contract and was also referred to in the concession contract; and Ecuador provided a general legal framework favouring ICSID arbitration for both contract and treaty disputes.

#### **Confidential award becomes public following challenge in US courts**

A fundamental difference between ICSID arbitration and arbitration under other rules is that the former does not allow recourse to national courts to challenge an award. By contrast, investment arbitrations which take place under, for example, the UNCITRAL Arbitration Rules, will be subject to the supervisory jurisdiction of the courts of the seat of arbitration. That means that any challenge to the award must be made before those courts. This difference in procedure was brought into sharp relief recently when Argentina applied to a US court to vacate or modify an award that had been made in favour of British Gas. The arbitration had taken place under the UNCITRAL Arbitration Rules, with its seat in Washington DC. The award was subject to a confidentiality order by the tribunal. However, it went on the public record in March 2008 when it was appended to an application by Argentina to the US District Court for the District of Columbia.

The tribunal had found that Argentina had breached its obligations, under the BIT between the UK and Argentina, to provide fair and equitable treatment and protection from unreasonable measures. It had rejected Argentina's defence of "necessity" (brought about by the financial crisis). British Gas was awarded over US\$185 million plus interest.

Argentina has challenged every known investment treaty award against it. One of the grounds on which Argentina now seeks to vacate the *British Gas* award is that the ICC erred in rejecting a challenge to Professor Albert van den Berg as arbitrator. The basis of Argentina's objections to Professor van den Berg is that he was also an arbitrator in two other cases involving Argentina (*LG&E* and *Enron*). Specifically, Argentina contends that it had justifiable doubts as to the independence and impartiality of Professor van den Berg because he had signed two awards which contained contradictory decisions. In *LG&E*, the tribunal had accepted Argentina's "necessity" defence, whereas it had rejected it in *Enron*. Argentina's challenge to Professor van den Berg was referred to the ICC, as the appointing authority in that case. The ICC rejected the challenge but, as is its practice, did not give reasons for its decision. Argentina complains that the ICC's decision and its failure to provide reasons is an excess of powers.

Unsurprisingly, Argentina's challenge to an arbitrator in a subsequent arbitration (*National Grid v Argentina*) was referred to the LCIA, which publishes reasons for its decisions.

## **DEVELOPMENTS IN NATIONAL LAW**

### **UK: English court sets aside worldwide freezing order in support of "foreign" arbitration**

The English Commercial Court recently set aside an order freezing the assets of a party to a foreign arbitration. The ability to seek injunctions from national courts in disputes subject to arbitration is an important weapon in the armoury of claimants. In *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), the court gave guidance on when it will be appropriate to grant worldwide freezing orders.

In January 2008, the English court granted Mobil Cerro Negro (Mobil) a temporary worldwide freezing order against the Venezuelan national oil company, Petroleos de Venezuela SA (PDVSA). The order froze assets of up to \$12 billion and was made in support of an ICC arbitration between Mobil and PDVSA. The seat of the arbitration is New York; the parties are Bahamian and Venezuelan respectively; and the governing law of the underlying contract is Venezuelan. PDVSA applied to set aside the order.

The following guidelines emerge from the judgment:

- Worldwide freezing orders are made "only sparingly" and when they are, there is usually "compelling evidence of serious international fraud"
- An applicant for a freezing order must demonstrate that it is "just and convenient" to make such an

- order (as required by section 37 of the Supreme Court Act 1981)
- Section 44 of the Arbitration Act 1996 limits the power of the court to grant injunctions in relation to arbitration proceedings
  - If the case is urgent, the court may make orders for the preservation of assets or evidence (section 44(3) of the 1996 Act)
  - If the application is not urgent, the court may only grant an injunction with the permission of the tribunal or the agreement in writing of the other parties (section 44(4) of the 1996 Act)
  - Under section 2(3) of the 1996 Act, where the seat of arbitration is outside England, Wales or Northern Ireland, the court may refuse to exercise its section 44 power to grant injunctions, if the fact that the seat is elsewhere makes it “inappropriate” to do so
  - In the absence of any exceptional feature such as fraud, an applicant must demonstrate a link with English jurisdiction in the form of substantial assets of the respondent located in England.

Applying the above guidelines to the facts of this case, the judge held that the freezing order had to be set aside. Mobil could not show that a freezing order was “just and convenient” and specifically that there was a real risk of dissipation of assets. There was no good arguable case that PDVSA's conduct in relation to its assets was unjustified. It followed that Mobil could not show that the case was one of urgency. Therefore, it could only make an application for a freezing order with the permission of the ICC

tribunal (as yet unconstituted) or the written agreement of PDVSA. Mobil had not been able to demonstrate a link with the jurisdiction in the form of substantial assets of PDVSA. In the absence of any exceptional feature such as fraud and in the absence of substantial assets of PDVSA located in England, the fact that the seat of the arbitration was elsewhere made it “inappropriate” to grant an order under section 2(3) of the 1996 Act.

#### **UK: English court endorses partial enforcement of New York Convention award**

The English Commercial Court has held that it is permissible to enforce part of a New York Convention award. This is an important judgment which gives effect to the spirit of the New York Convention, by allowing enforcement of those parts of an award that are highly unlikely to be invalid. A welcome development for those enforcing New York Convention awards in England and Wales.

In *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2008] EWHC 797 (Comm), the award in question was made in Nigeria. IPCO sought to enforce the award in England and Wales. Since the UK and Nigeria are both parties to the New York Convention, enforcement was governed by the New York Convention regime, as enacted in English law by sections 100-104 of the Arbitration Act 1996 (the 1996 Act). As the award was subject to an application to set it aside in the Nigerian courts, IPCO's original application to enforce had been adjourned pending the outcome of that application in Nigeria. IPCO now sought to vary the order for adjournment.

The judge held that in the circumstances, the court would be justified in taking the unusual step of reconsidering the question of adjournment – “catastrophic” developments in the Nigerian proceedings indicated that they would not be decided in the near future.

Mr Justice Tomlinson then went on to consider whether enforcement of a New York Convention award had to be on an all or nothing basis. The judge was clearly concerned that one potentially minor aspect of an award that might be set aside in the local jurisdiction could have the effect of preventing enforcement of significant aspects of the award which were unlikely to be held invalid.

The judge was persuaded that partial enforcement was permissible and was to be encouraged where it would do justice to the spirit of the award. He was persuaded by various factors, including: a decision of the Austrian Supreme Court permitting partial enforcement of a New York Convention award; the fact that Nigerian law permitted arbitral awards to be upheld as to part; an earlier order in the proceedings which had, in effect, required partial enforcement; and the fact that partial enforcement had been ordered by the English courts in the context of section 66 of the 1996 Act in relation to a domestic arbitration award.

From a practical point of view, it would be worth seeking to have awards structured under separate headings, so that potentially contentious aspects of an award can be “severed” from less contentious aspects where appropriate.

### UK: English Court of Appeal gives guidance on confidentiality rule

Arbitration is, under English law at least, a confidential process. The parameters of the confidentiality rule have been developed by case law and therefore evolve on a case by case basis. In *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, the Court of Appeal gave some useful guidance on the obligation of confidentiality and its limits.

Mr Emmott wanted to be able to disclose in foreign court proceedings documents generated in an ongoing London arbitration. Both the arbitration and the foreign court proceedings had been commenced by Michael Wilson & Partners (MWP). Although Mr Emmott was the respondent in the arbitration, he was not a defendant in the foreign litigation (although the defendants did have similar interests to him). The basis for seeking disclosure was that MWP's case in the arbitration was materially inconsistent with that advanced in the litigation and MWP was presenting the foreign courts with misleading or inaccurate information.

The judge held that disclosure was in the interests of justice so that the foreign courts would not be misled where the claims in the various proceedings were essentially based on the same or similar allegations. MWP appealed.

The Court of Appeal dismissed its appeal. Key points emerging from the Court of Appeal's judgment are:

- *"The overwhelming majority of arbitrations in England are conducted in private and with complete confidentiality"* (Lawrence Collins LJ)

- Confirmation that under English law the obligation of confidentiality is implied by law and arises out of the nature of arbitration
- The confidentiality obligation is really a substantive rule of arbitration law "masquerading" as an implied term
- The content of the confidentiality obligation may depend on the context in which it arises and on the nature of the information or documents at issue
- There was a danger that the foreign courts would be misled if the documents were not disclosed. Therefore, the interests of justice required disclosure
- The interests of justice were not confined to the interests of justice in England.

An interesting question which arose, but on which no decision was necessary, was whether in the context of an ongoing arbitration, such applications for disclosure should be made to the tribunal or the court. Lord Justice Thomas thought that decisions on the ambit of the confidentiality obligation (arising as it does out of the arbitration agreement) should normally be for the tribunal. Lord Justice Lawrence Collins expressed the "tentative" view that any dispute as to the scope of the confidentiality rule should be determined by the arbitral tribunal. In the reported cases on confidentiality, the forum for applications regarding confidentiality has always been the court. However, given that the obligation of confidentiality is an implied term of the arbitration agreement, it is highly arguable that the tribunal should indeed be the decision-maker on this issue.

### INDIA: Supreme Court allows Indian courts to hear challenges to foreign awards

The Indian Supreme Court has held that foreign awards may be challenged in the Indian courts under Part I of the Indian Arbitration and Conciliation Act 1996 (the 1996 Act), unless the parties agree otherwise (*Venture Global Engineering v Satyam Computer Services*, 10 January 2008). This is almost certainly a breach of India's obligations as a signatory of the New York Convention, under which it is generally accepted that the courts of the State in which the award was made have exclusive jurisdiction over challenges to the award itself. As such, it is a worrying development for businesses with Indian connections.

Global Venture, a US company, and SCS, an Indian company, entered into a joint venture agreement, under which Satyam Venture Engineering Services (SVES) was formed. Disputes arose and were referred to LCIA arbitration in London. An award was made in SCS' favour, ordering Venture Global to transfer shares in SVES to SCS. A court in Michigan made an order enforcing the award. Venture Global subsequently issued proceedings in Secunderabad, seeking to have the award quashed and an injunction on the transfer of shares. The City Civil Court of Secunderabad (where SCS is based) and the High Court rejected the application, but the Supreme Court allowed the US company's appeal, with the result that Venture Global may proceed with its challenge to the award in Secunderabad.

The decision is a concern for international businesses because it means that the Indian courts'

intervention in arbitration now extends to foreign awards. This is particularly bad news because recent decisions of the Indian courts have extended the scope of judicial review of arbitral awards. For example, in *ONGC v Saw Pipes* the Supreme Court interpreted the “public policy” exception to enforcement of awards very broadly.

In order to stand any chance of avoiding unwelcome intervention by the Indian courts, parties would be well advised to include in any India-related arbitration clause an express agreement excluding Part 1 of the 1996 Act.

#### **UNITED STATES OF AMERICA: US appeal court rejects “collateral attack” on Swiss award**

Contrast the Indian Supreme Court’s decision in *Venture Global* (above) with a recent decision of a US appeal court. In *Gulf Petro and others v Nigerian National Petroleum Corporation and others*, the US Court of Appeal for the Fifth Circuit held that it lacked jurisdiction over a claim by Gulf Petro for damages for the alleged bribery of an arbitral tribunal. The tribunal in the arbitration under the rules of the Chamber of Commerce and Industry of Geneva, with its seat in Geneva, had made an award in NNPC’s favour in a contractual dispute brought against it by Petrec International (a Gulf Petro subsidiary). Petrec had unsuccessfully sought to set aside the award in the Swiss courts. Gulf Petro then issued proceedings in Texas seeking damages for alleged bribery. The Court of Appeal of the Fifth Circuit firmly declined jurisdiction over the claim, upholding the principles underlying

the New York Convention. It distinguished between the competence of a court in the jurisdiction in which an award is made (the primary jurisdiction) and that of a court in any other New York Convention signatory state. Only the courts in the primary jurisdiction have jurisdiction to set aside the award.

The court held that Gulf Petro’s damages claim amounted to no more than a collateral attack on the arbitral award. Such attacks fell to be made in Switzerland, as the seat of arbitration and the primary jurisdiction for the purposes of the New York Convention.

#### **CHINA: New arbitration institution for financial disputes in Shanghai**

December 2007 saw the inauguration of the Shanghai Court of Financial Arbitration. It is part of the Shanghai Arbitration Commission and has a panel of local and foreign financial and legal experts. Mark Lin, a partner in Lovells’ International Arbitration group in Hong Kong comments that: “The recent inauguration of the Shanghai Court of Financial Arbitration is to be welcomed as providing a much needed additional platform for the resolution of increasingly sophisticated and complex financial disputes faced by international financial institutions operating in China. With the gradual liberalisation of the financial markets, more and more sophisticated financial instruments and products are being introduced to the Chinese market and it is inevitable that there will be disputes arising from such new instruments and products. It is a step in the right direction to set up a pool of experts in Shanghai to deal with such disputes.”

#### **DUBAI: UAE and DIFC publish new draft arbitration laws**

In addition to the launch of the DIFC LCIA Arbitration Centre (see LCIA news above), the DIFC has released a draft arbitration law which will provide a legislative platform for dispute resolution. The DIFC is entitled, as a “free zone” under the UAE Constitution, to enact its own English language civil and commercial laws. The DIFC is expected to introduce the new DIFC Arbitration Law in the second quarter of 2008. It will be a far more comprehensive piece of legislation than the DIFC Arbitration Law 2004, which it replaces. The DIFC draft law closely follows the 1985 UNCITRAL Model Law on International Commercial Arbitration with the addition of a range of supplementary and additional provisions.

To coincide with this development, the UAE Ministry of Economy, working in conjunction with the Ministry of Justice, has produced a new draft federal arbitration law for consultation. This will apply to all arbitrations in the UAE, except those conducted in the DIFC. The new law, like that of the DIFC, is based on the 1985 UNCITRAL Model Law, incorporating its entire text with some minor adjustments in clearly marked Additional and Supplementary provisions set out distinctly from the main text. The law is expected to be ratified and issued within the first half of 2008. It is hoped that the new law will facilitate the process of enforcing arbitration awards within the UAE, which has come to be perceived as notoriously difficult.

**HONG KONG: Consultation on reform of arbitration law**

The Hong Kong Department of Justice has issued a consultation paper on the reform of Hong Kong's arbitration law. The consultation paper attaches a draft bill. Comments on the draft bill and issues raised in the consultation paper are invited, the deadline being 30 June 2008. The draft bill is intended to be more user-friendly than the current law and thereby enhance Hong Kong's attraction as a seat of arbitration. The key feature of the draft bill (which is based on the UNCITRAL Model Law on International Commercial Arbitration) is that it removes the distinction between domestic and international arbitration. The new law will apply to all arbitrations with their seat in Hong Kong.

**SYRIA: Syria adopts new arbitration law**

Following the recent trend in the Middle East, Syria issued on 25 March 2008 a new arbitration law based on the UNCITRAL Model Law. This law will apply to all contracts signed after 1 May 2008.

The new law will allow arbitration parties to choose freely the following:

- Arbitration procedures (ICC, LCIA, DIAC or any other Syrian or international arbitration centre rules and procedures)
- Place of arbitration - which can be Syria or elsewhere
- Language of the arbitration - although the default language will be Arabic if parties do not agree otherwise.

However, the new law has not modernised the process of enforcement of foreign arbitral awards.

# US Supreme Court: Parties may not agree wider grounds for challenge

Eric Chang<sup>1</sup>



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In a highly anticipated decision dated 25 March 2008, the US Supreme Court ruled that parties may not contractually expand the judicial grounds for vacatur or modification of arbitration awards beyond those set out in the Federal Arbitration Act (the “FAA”).<sup>2</sup> In doing so, it resolved a split of authority on the issue among the federal circuit courts. The decision, *Hall Street Associates, L.L.C. v Mattel Inc.*<sup>3</sup> effectively puts an end to a recently emerging commercial practice whereby companies draft arbitration agreements providing for a more thorough judicial review of arbitration awards than is provided in the FAA.

The FAA sets out very narrow grounds for the judicial review of arbitration awards. Under section 10 of the FAA, a federal district court judge will vacate an award only where it is procured by corruption, fraud or other undue means; where there is evident partiality or other misconduct by the arbitrators, or if the arbitrators exceed their powers or imperfectly execute these powers. Section 11 of the FAA provides the limited grounds for judicial modification of arbitral awards such as mistakes of calculation, or awards dealing with a matter not submitted to the arbitrators.

At issue in the case was a landlord-tenant litigation dispute before the US District Court in the state of Oregon. With the approval of the District Court, the parties submitted one of the claims to arbitration. The arbitration agreement in question provided in part as follows:

*“[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct an award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”<sup>4</sup>*

Following the arbitration proceedings and issuance of the award, the landlord relied on the arbitration agreement and petitioned the District Court to vacate the award on the ground that the arbitrator’s decision constituted legal error. The District Court agreed and vacated the award, expressly relying on the more lenient standard of review outlined by the arbitration agreement.

Upon review, the US Court of Appeals for the Ninth Circuit reversed, holding that the District Court could only vacate or modify the arbitration award on the limited grounds available under the FAA. Due to a divergence in the different circuit courts,<sup>5</sup> the US Supreme Court granted certiorari and agreed to review the case.<sup>6</sup>

The Supreme Court confirmed the Ninth Circuit’s ruling, holding that while parties are free under the FAA to tailor many features of arbitration by contract, they may not expand the standards for judicial review of awards beyond the grounds set out in sections 10 and 11 of the FAA. The court emphasised “*the national policy*

*favoring arbitration with just... limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”<sup>7</sup>*

By contrast, the dissenting opinion by Justices Stevens and Kennedy pointed out that the primary purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. The dissent further noted that the mandatory grounds for vacatur or modification enumerated in sections 10 and 11 of the FAA do not necessarily mean that these are exclusive or exhaustive.

Beyond the narrow issue of whether parties may contract for expanded judicial review of arbitration awards, the Supreme Court’s decision raises certain additional questions.

First, the majority was careful to limit its holding to those cases which are brought under the FAA, suggesting that parties might contemplate enforcement of awards under state statutes or common law, where the standards of judicial review could be of an entirely different scope. This implies that while the FAA normally trumps, or “pre-empts” inconsistent state arbitration laws, the FAA provisions on enforcement and vacatur of awards may not enjoy such preemptive rights, raising a number of possibilities. Parties in state court, for example, could opt for judicially expanded review of awards. Parties might also explicitly opt for an appropriate state arbitration statute in a given arbitration agreement such

<sup>1</sup> Eric Chang is an Associate in Lovells’ International Arbitration practice. He is based in the New York office.

<sup>2</sup> 9 U.S.C. §§ 10 and 11.

<sup>3</sup> No. 06-989 2008 WL 762537 (U.S. Mar. 25, 2008).

<sup>4</sup> See id. at \*3.

<sup>5</sup> The eleven United States Circuit Courts of Appeals are the federal appellate courts, each covering several states. The Ninth Circuit, which heard the *Hall Street Associates* case on appeal, has jurisdiction over the US District Courts in California, Nevada, Arizona, Idaho, Montana, Washington, Oregon, Alaska, Hawaii, as well as Guam.

<sup>6</sup> The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review, while the First, Third, Fifth, and Sixth Circuits have held that parties may so contract. Id. at \*4, FN5.

<sup>7</sup> Id. at \*7.

that an agreed-upon expanded judicial review of awards would be permitted even in federal court.

favouring arbitration as a mode of dispute resolution in the United States.

The Supreme Court also posed the question (without answering it) of whether a court-sanctioned arbitration agreement (as occurred under the facts of the case) allowing for expanded judicial review might be treated as an exercise of the District Court's authority to manage its cases under the Federal Rules of Civil Procedure.

Finally, the Supreme Court left open the issue of whether additional grounds for review created by federal case law are now expressly prohibited as well. The standard of "manifest disregard of the law" is a ground for review which is not included in the FAA, but which federal courts have created and currently use to review arbitral awards. The Supreme Court's opinion did not resolve this issue directly, and for the time being, "manifest disregard of the law" remains a viable (but limited) ground for vacatur under existing federal case law.

From a commercial perspective, *Hall Street Associates* effectively prohibits the practice emerging in certain industries of concluding arbitration agreements providing for expanded judicial review of awards where the awards contain clear errors of legal reasoning or which are clearly unsupported by the evidence. Companies which conclude these types of arbitration agreements have argued that the Supreme Court's decision will effectively turn many parties away from arbitration in the first place, thus undermining the federal pro-arbitration policy. It seems unlikely, however, that *Hall Street Associates* will slow the continued trend

# The Cost of International Arbitration

Simon Nesbitt and Saira Singh<sup>1</sup>



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“How much will it cost?” and “Can we recover our costs?” are fundamental questions posed by most business managers faced with arbitration. Whether claimant or respondent, businesses need to assess their exposure, both in terms of time and money, before deciding how to deal with a claim. The flexibility of the arbitral process, giving parties and the tribunal the ability to tailor procedures to suit the particular case, should mean that the costs of arbitration are lower than those in litigation. However, the issue of costs in arbitration has been judged of sufficient concern to merit an ICC report on “Techniques for Controlling Time and Costs in Arbitration”, giving guidance on ways of efficiently managing arbitration proceedings.

This article provides some general guidance on the cost of international arbitration, by explaining the different categories of costs that will be incurred, the powers of arbitrators in relation to costs and how they exercise those powers.

## What are the costs of arbitration?

In court litigation, the costs of the proceedings will be mainly legal counsel’s fees and disbursements (such as expert witnesses’ fees), with a relatively small amount for court fees (though this may vary from jurisdiction to jurisdiction). In arbitration, by contrast, the costs will also include the following:

- The arbitral tribunal’s fees and expenses. In an ad hoc arbitration, the fees of each arbitrator will normally be agreed at the outset of the arbitration and will typically take the form of an

hourly rate, with perhaps a daily rate for hearings. Article 39(1) of the UNCITRAL Arbitration Rules provides that the tribunal’s fees shall be “reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case”. If the arbitration is ad hoc but the arbitrators have been appointed by an appointing authority which has its own schedule of fees, the arbitrators should take that schedule into account when fixing their fees, to the extent that they consider it appropriate (Article 39(2)).

If the parties have agreed to institutional arbitration, the level of arbitrators’ fees will normally be set by the institution. Under the ICC Rules, arbitrators’ fees and expenses are fixed according to a scale, expressed as a percentage of the amount in dispute and are calculated by reference to factors including the time spent by the arbitrators and the complexity of the dispute. By contrast, under the LCIA Rules, arbitrators’ fees are based solely on time spent; the hourly rate is fixed by reference to factors such as the complexity of the dispute and the special qualifications of the arbitrators. The rate will normally be between £150 and £350 per hour, although it may be higher or lower in exceptional circumstances.

- The fees and expenses of the administering institution or appointing authority (if any).

Arbitration administered by an institution comes at a cost, namely the institution’s administrative fees. Parties who have agreed to arbitration under the LCIA Rules must pay the LCIA’s administrative charges. These include a registration fee (£1500, payable by the claimant when filing the request for arbitration), charges for time spent by the LCIA Secretariat and the LCIA Court, administrative expenses, and an overhead fee equivalent to 5% of the tribunal’s fees.

The ICC charges a registration fee of US\$2500, payable when the request for arbitration is filed. Otherwise, the ICC’s administrative expenses are calculated on a sliding scale depending on the amount in dispute, although the ICC may charge more or less in exceptional circumstances. The maximum amount payable for administrative expenses will be US\$88,800 (for disputes worth more than US\$80,000,000). In the case of the ICC, the administrative expenses are meant to be shared between the parties. However, the arbitration will not proceed unless the expenses are paid, so in practice the claimant may well have to pay the full amount if the respondent is recalcitrant. In the case of both the ICC and the LCIA, the tribunal’s and the institution’s costs must be paid by the parties before the award will be released to them.

The parties to an ad hoc arbitration will be able to cross

<sup>1</sup> Simon Nesbitt is a Partner and Saira Singh a Professional Support Lawyer in Lovells’ International Arbitration practice. They are both based in the London office.

this item off their list, unless they have used the services of an appointing authority. For example, the LCIA's fees for acting as appointing authority constitute an appointment fee of £1000, payable with the request for appointment, with time spent by the LCIA Secretariat charged on an hourly basis and expenses charged at hourly rates or at cost.

- the cost of hiring a venue for arbitration hearings
- charges for transcription and translation services, where necessary

#### Does the tribunal have power to award costs?

Whether or not a tribunal has the power to make costs awards in arbitration will depend upon two things: the arbitral law of the seat of the arbitration and the arbitral rules agreed by the parties.

Most modern arbitral laws are either silent on the issue of costs (for example, the French New Code of Civil Procedure (Book IV) and the Swiss Private International Law Statute 1990 (Chapter 12)) or give the tribunal the power to allocate the costs of the arbitration as between the parties. For example, section 1057 of the Tenth Book of the German Code of Civil Procedure provides for the tribunal (unless the parties agree otherwise) to allocate the costs as between the parties at its discretion and taking into account the circumstances of the case, particularly the outcome of the proceedings. Section 61 of the English Arbitration Act 1996 also gives the tribunal the power to allocate costs as between the parties and envisages that, unless otherwise agreed by the parties,

the general principle will be that “costs should follow the event” unless that would be inappropriate in the circumstances of the case.

Whilst it is open to the parties, under English law, to agree that one or other of them will bear all or part of the costs, any such agreement will only be valid if made after the dispute in question arose (section 60 Arbitration Act 1996). The upshot of this is that any agreement to that effect in the arbitration clause itself will not be enforceable and the allocation of costs will be governed by relevant provisions in the law of the seat and/or the applicable arbitral rules and/or the tribunal's discretion.

Turning to the rules which the parties have agreed will apply to the arbitration, a brief review of the most commonly used international arbitration rules reveals that they generally leave the question of costs to the tribunal to decide in their discretion:

- Article 31(3) of the ICC Rules merely states that the final award should fix the costs of the arbitration and decide which of the parties should bear them or in what proportion they should be borne by the parties.
- Article 28 of the LCIA Rules is more detailed and provides that, unless the parties agree otherwise, the tribunal has the power to award costs on the general principle that costs should reflect the parties' “relative success and failure in the award or arbitration”, unless that approach appears inappropriate in the circumstances. The LCIA Rules

also require tribunals to elucidate in the award their reasons for costs orders made.

- The default position under the UNCITRAL Rules is that the costs of the arbitration (apart from successful party's legal fees) should be borne by the unsuccessful party. However, the tribunal may exercise its discretion to apportion the costs between the parties based on the circumstances of the case. It is up to the tribunal to decide the apportionment of legal fees as between the parties.

As can be seen above, even if the arbitration law of the seat and/or the arbitral rules contain rules on costs, the tribunal will nevertheless normally have a wide discretion in making costs decisions. If both the applicable arbitral rules and the arbitration law of the seat are silent on the issue of costs, it will be up to the parties and/or the tribunal to decide the tribunal's powers on costs. Again, the tribunal may have “carte blanche” to deal with costs as it sees fit. In most cases, therefore, the focus will be the way in which the tribunal exercises its discretion.

#### How do tribunals allocate costs in practice?

Tribunals in international arbitrations are not bound to follow any particular approach when allocating costs (other than any rules contained in the arbitration law of the seat and/or arbitral rules, which as seen above are either non-existent or essentially give the tribunal broad discretion). It is therefore difficult to predict with certainty the approach a particular tribunal will take. Factors which may

be taken in account by arbitrators include: (1) their own legal cultural background; (2) the approach of the courts of the seat of arbitration; and (3) the approach of the courts in the “home” jurisdictions of the parties. Either way, it is useful to have a broad idea of the way the issue of costs is dealt with across a variety of jurisdictions.

In many jurisdictions, especially European (for example, England and Wales, France, Germany), the general rule is that costs follow the event, unless the circumstances of the case dictate a different result. However, that rule may be applied in different ways. For example, in Germany and Switzerland, the parties will usually be ordered to bear the costs in proportion to their relative success or failure. This may mean that if the claimant wins but recovers less than claimed, the respondent has been successful as to the difference and this will be taken into account when allocating the costs between them. In England, costs will normally be awarded to the winner of the overall case, regardless of whether they recovered less than claimed (unless they recovered a nominal amount, in which case they will probably be deemed to have lost). One exception to that general rule would be where the successful party has lost on an issue on which substantial time and costs were spent. In that case, the party who won on that issue might well be awarded its costs of that particular issue.

Under the “American Rule”, it appears that a tribunal in an arbitration with its seat in the US may only order the losing party to pay the legal fees of the successful party if the parties' contract, a specific statute or the arbitration

rules allow it. The International Arbitration Rules of the International Centre for Dispute Resolution (the international arm of the American Arbitration Association) address this issue by giving the tribunal the power to apportion costs between the parties if it considers it would be reasonable to do so. Those costs expressly include the “reasonable costs for legal representation of a successful party” (Article 31).

#### How much will you recover?

Assuming that the tribunal has awarded the successful party some or all of its costs of the arbitration, including its legal fees and expenses, the next step will be an assessment of how much that party will recover. The position is straightforward in relation to the basic costs of the arbitration, that is, the arbitrators' fees, any institutional administrative fees and expenses and the logistical costs of the arbitration - the successful party should be able to recoup its outlay. There is more room for debate regarding legal fees and expenses. In most cases, the benchmark is for recovery of “reasonable costs” (Article 31(1) of the ICC Rules, Article 38(e) of the UNCITRAL Rules, Article 28.3 of the LCIA Rules). The English Arbitration Act 1996 goes a step further, providing that unless otherwise agreed, any doubt as to whether costs were reasonably incurred should be resolved in favour of the paying party. That reflects the traditional approach in English litigation.

The question of reasonableness can be separated into two strands: were the costs incurred in respect of work which was necessary for the arbitration and, if so, are the amounts claimed reasonable? A breakdown of costs will

usually need to be submitted to the tribunal and to the paying party, who will have an opportunity to comment on the costs claimed. In arbitrations in England, the tribunal may go through a process of formally assessing costs, in the same way that a court would, that is, reviewing each item claimed. However, in view of the cost of such an exercise, they and other tribunals are more likely to decide the matter pragmatically, for example, by comparing the parties' respective legal costs. If they are substantially the same, the tribunal will probably take the view that the successful party's costs were reasonable and award them in their entirety. The fact that the paying party's costs are somewhat lower will not necessarily mean that the successful party's costs are unreasonable, however - the arbitral tribunal will need to review the circumstances in which the costs were incurred. It may be that the way in which the unsuccessful party conducted its case was a contributory factor.

One item which can be controversial is the internal time cost of a party's own executives and in-house counsel, and specifically whether this falls within “legal fees and expenses”. Some arbitrators take the view that such time is part of the normal cost of running a business and therefore should not be “reimbursed” by the other party. Others consider that such costs should be recoverable, especially if the work of the individuals in question would otherwise have been given to external consultants (whose fees would be recoverable). Indeed, there have been cases where tribunals have allowed such costs and therefore it is worth including them in the overall costs claim, provided they can be supported by proper time records.

**Interest**

One often-overlooked issue is the ability to claim interest on costs. If damages have been awarded, the tribunal will usually also order interest from the date the breach or damage occurred (if claimed and if otherwise available). In most cases – subject to any contrary position in the applicable law or practice – interest should also be available on costs. For example, in the case of legal counsel's fees, interest would run from the date the client paid the bill. In a long-running, complex arbitration, interest on costs can be well worth claiming.

**Conclusion**

The cost of international arbitration can be substantial and it is essential to build an estimate of the price of winning or losing into the matrix when deciding how to proceed. It is not possible to guarantee the outcome of an arbitration, but at least businesses can be forewarned as to the likely cost and their chances of recovery. As a general rule, the parties can expect that costs will follow the event and therefore that the successful party will recover some or all of their costs. Thereafter, it will be a question of satisfying the tribunal that the costs were reasonably incurred.

# New York Convention: 50 years and counting

Russell Johnston<sup>1</sup>



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The International Bar Association celebrated the 50th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in February 2008 with a conference at the Waldorf Astoria in New York City. The New York Convention was adopted on 10 June 1958 and entered into force on 9 June 1959. It was lauded for its tremendous success and for its role as one of the most important treaties relating to international arbitration. The conference included a video interview with the Convention's author, Pieter Saunders. Speakers and participants also used the occasion to discuss practical issues and criticisms of the Convention and ideas for how it could be amended. Renaud Sorieul, UNCITRAL senior legal counsel, stated "the festive spirit shouldn't stop us from looking at the Convention's lacunae and occasional lack of precision in its concepts". He added that "after 50 years we are still not entirely clear, in article 1, what an 'award' is." In addition to the IBA event, VIAC<sup>2</sup>-UNCITRAL held a conference in March discussing issues related to supplementing and strengthening the implementation of the Convention.

The New York Convention is widely considered the foundational instrument for international arbitration and arbitration's success around the world as a mode of dispute resolution is largely due to the fact that the Convention allows the free "circulation" and enforcement of awards among the signatory countries. No such extensive treaty exists for

conventional court judgments. The Convention currently counts over 140 countries as signatories. Despite its success, however, the Convention has been subject to varying interpretations, creating an uneven application in different countries. For instance, recent decisions<sup>3</sup> by the French Cour de Cassation have confirmed the principles initially described in the *Hilmarton*<sup>4</sup> case, whereby arbitral awards are enforced regardless of a previous annulment by a court in the jurisdiction in which the arbitration took place. These holdings have contrasted with decisions in other countries, including the US. Recent decisions in the US have confirmed the principles set forth initially in *Chromalloy*<sup>5</sup> and *Baker Marine*<sup>6</sup>. In *Baker Marine*, the United States Second Circuit Court of Appeals held that enforcement of an arbitral award could not be sought in the US where the award had previously been set aside by the country in which the award was made.

These differences in interpretation have been part of the catalyst for calls to amend the Convention. Even those who praise it have suggested that changes and adjustments could be implemented to create a better and more unified understanding. Indeed, the ICC's Commission on Arbitration has created a task force on national rules of procedure. The task force has laid out four specific objectives: (1) to identify the countries to be covered by the work of the task force; (2) to determine the national rules of procedure for recognition and enforcement of foreign arbitral awards; (3) to compile all such

national rules of procedure for recognition and enforcement on a country-by-country basis in one user-friendly document; and (4) to draft an introduction and summary of such compilation. Additionally, the IBA Arbitration Committee assisted in a survey conducted by the UNCITRAL International Arbitration Working Group on how the New York Convention has been implemented. The survey examines how the New York Convention has been implemented in the countries which are parties to it and provide an analysis of local law, rules of applicable procedure, costs, enforcements, and appeals.

The New York Convention has proven a great achievement over the past 50 years and has provided the bedrock allowing international arbitration to develop so successfully. Here's to the next 50 years.

<sup>1</sup> Russell Johnston is an Associate in Lovells' International Arbitration practice. He is based in the New York office.

<sup>2</sup> International Arbitral Centre of the Austrian Federal Economic Chamber

<sup>3</sup> *Societe Putrabali Adyamulia v SA Rena Holding et autre*, 2 Decisions, No. 05-18.053 and No. 06-13.293, Cour de Cassation, 1st Civil Chamber (2007)

<sup>4</sup> *Hilmarton Ltd. v Ommium de Traitement et de Valorisation*, Decision No. 484, Cour de Cassation, 1st Civil Chamber (1994).

<sup>5</sup> *Chromalloy Aeroservices Inc. v Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996).

<sup>6</sup> *Baker Marine Ltd. v Chevron Ltd.*, 191 F.3d 194 (2d Cir. 1999).

# Our offices worldwide

## Asia

### Beijing

#### Lovells LLP

Tel: +86 10 8518 4000

Fax: +86 10 8518 1656

### Ho Chi Minh City

#### Lovells LLP

Tel: +84 8 829 5100

Fax: +84 8 829 5101

### Hong Kong

#### Lovells

Tel: +852 2219 0888

Fax: +852 2219 0222

### Shanghai

#### Lovells LLP

Tel: +86 21 6138 1688

Fax: +86 21 6279 2695

### Singapore

#### Lovells Lee & Lee

Tel: +65 6538 0900

Fax: +65 6538 7077

### Tokyo

#### Lovells Horitsu Jimusho

#### Gaikokuho Kyodo Jigyo

Tel: +81 3 5157 8200

Fax: +81 3 5157 8210

## Europe

### Alicante

#### Lovells (Alicante) Limited & Cia.

Tel: +34 96 513 83 00

Fax: +34 96 513 83 03

### Amsterdam

#### Lovells LLP

Tel: +31 20 55 33 600

Fax: +31 20 55 33 777

### Brussels

#### Lovells LLP

Tel: +32 2 647 06 60

Fax: +32 2 647 11 24

### Budapest\*

#### Partos & Noblet

Tel: +36 1 505 4480

Fax: +36 1 505 4485

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Tel: +49 211 13 68 0

Fax: +49 211 13 68 100

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Tel: +49 69 962 36 0

Fax: +49 69 962 36 100

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Fax: +49 40 419 93 200

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Fax: +44 20 7296 2001

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Fax: +34 91 349 82 01

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Fax: +39 02 72025252

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Fax: +49 89 290 12 222

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Tel: +33 1 53 67 47 47

Fax: +33 1 53 67 47 48

### Prague

#### Lovells (Prague) LLP

Tel: +420 221 411 700

Fax: +420 224 210 004

### Rome

#### Lovells Studio Legale

Tel: +39 06 6758231

Fax: +39 06 67582323

### Warsaw

#### Lovells H Seisler sp.k.

Tel: +48 22 529 29 00

Fax: +48 22 529 29 01

### Zagreb\*

#### Bogdanovic, Dolicki & Partners

Tel: +385 1 600 56 56

Fax: +385 1 600 56 57

## Middle East

### Dubai

#### Lovells (Middle East) LLP

Tel: +971 4 304 5555

Fax: +971 4 304 5550

## United States

### Chicago

#### Lovells LLP

Tel: +1 312 832 4400

Fax: +1 312 832 4444

### New York

#### Lovells LLP

Tel: +1 212 909 0600

Fax: +1 212 909 0660

\* Associated offices

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